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## The Impact of the New Davis Bacon Rule

Part 2

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In addition to expanding the scope of Davis Bacon to cover more workers and more off-site locations, the Department of Laborer's new Davis Bacon rule made substantial changes in the way that prevailing area wage rates will be calculated in the future.

While some of the components in the DOL's new rule are true clarifications of existing practices, other components are outright changes.

Among the most significant changes are:

1. The return of the 30% Rule. Prevailing area wage rates are currently set by determining: a) the wage rate paid to the majority (more than 50%) of the workers; b) in the appropriate classification; c) on similar projects in the area; d) during the period in question. These are the "relevant workers" for purposes of establishing prevailing area wage rates.

If there is not a majority wage rate paid to the relevant workers, then the prevailing wage rate is set at the weighted average of the wage rates paid to all of the relevant workers.

The new rule would return to the pre-Reagan "30% rule," adding a middle step to the analysis and determining prevailing area wage rates using the following method, in order:

- A. The wage rate paid to the majority of the relevant workers – this is not a change.
- B. If there is no wage rate paid to the majority of relevant workers, then the prevailing wage rate would be set at the wage rate paid to the greatest number of relevant workers, provided that those workers constitute at least 30% of the relevant workforce.
- C. If no wage rate is paid to 30% or more of the relevant workers, then the prevailing wage rate would be set at the average weighted wage rate paid to the relevant workers.

By reinstating the 30% rule and creating a situation where a lower level “plurality” wage rate (and not the weighted average) will be used to set the prevailing wage rate if there is not a majority wage rate, the new rule will result in collective bargaining agreements being given more weight in establishing prevailing area wage rates in areas where many (but not most) of the relevant workers work under the terms of a collective bargaining agreement.

The same process will be used for fringe benefit calculations. In addition, employers must annualize fringe benefit contribution rates, meaning that in cases where employers do not pay for covered fringe benefits on an hourly basis, the employer must calculate the annual value of its fringe benefits on an individual employee basis by dividing the total annual cost of the fringe benefit(s) by the total number of hours each employee works on all projects in a year. Employers must also obtain DOL review and approval for their existing fringe benefits within 18 months.

2. Periodic adjustments (increases) of non-collectively bargained prevailing wage rates. In many cases, prevailing area wage rates are closely tied to collective bargaining agreements. However, in areas where collective bargaining agreements are not used to establish the prevailing area wage rate (because they do not cover a majority of the relevant workers), the new rule would update<sup>1</sup> the prevailing wage rates every three years based on the general wage determinations made by the Bureau of Labor Statistics in its ECI wage data.

The ECI (Employment Cost Index) measures the change in the hourly labor cost for both wage and benefits to employers over time by using a fixed “basket” labor to produce a pure cost change. The ECI increased by 1% from March 2023 to June 2023 and increased by over 4.5% the year ending June 2023.

This change will have the effect of providing regular and potentially substantial increases to the prevailing area wage for non-collectively bargained (non-union) areas. Because it will be done on a three-year basis, these increases are likely to be substantial.

3. Expanding the scope of the data used to set prevailing wage rates. Under the current Davis Bacon rules, the default area for making a wage determination is the county, and wage determinations are normally based on wage survey data received from projects of a similar character in a given county, by construction type (building, residential, highway, heavy). The new rule makes several changes to this basic formula.

A. Expanding beyond the county level.

Under the new rule, if there is not sufficient usage data in any county to determine the prevailing wage rate, the DOL will progressively expand the geographic scope of the data search using the following process:

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<sup>1</sup> In areas where the prevailing wage rates were not based on collectively bargained contracts, 46% of the rates were 10 or more years old.

1. First, the geographic scope will be expanded to include a group of surrounding counties.
2. If there is still not sufficient usage data to make a prevailing wage determination, the DOL would consider a larger grouping of counties in the state (a “super group”) and could use data at a state-wide level.

B. Mixing urban and rural data.

There is currently a prohibition on combining data from metropolitan and rural counties to determine the prevailing area wage rates -- this prohibition applies even if the rural and metropolitan counties are next to each other. The new rule would abolish this prohibition and allow the DOL to use data from metropolitan counties to help set prevailing wage rates in rural counties if the DOL’s wage survey of the rural county did not obtain sufficient current wage data to set a prevailing wage rate.

This “mixing” of wage data would only apply to surrounding counties -- counties that share a border with the county for which additional wage data is sought -- and it would not be utilized if there is already sufficient wage data to allow the DOL to determine the prevailing wage. This mixing will have the greatest impact in situations where a rural county borders a metropolitan county.

The net impact of expanding the scope of data used to determine prevailing area wage rates will result in increasing the prevailing area wage rates in lower-rate counties by blending the wage rates in those counties with higher wage rates from neighboring counties. These changes will have a particular impact on renewable energy projects (such as solar farms and wind farms) covered by Davis Bacon and/or the Inflation Reduction Act -- many such projects are undertaken in rural areas, and blending wage data from rural areas with lower population and wage density with wage data from neighboring counties/metropolitan areas (with higher prevailing wage rates) will increase the prevailing wage rates and the overall cost of renewable energy projects.

C. Highway Projects.

The definition of “area” for purposes of prevailing wage determinations has been expanded to address highway projects. On multi-county highway projects, prevailing wage determinations may be based on the state department of transportation’s highway districts or similar state subdivisions rather than using the counties in which the highway is located. This will increase the cost of highway projects that are located in multiple counties that include both metropolitan and rural counties.

4. Mid-contract increases in the prevailing wage rate. Under the current regulations, prevailing wage determinations are generally applicable for the duration of a covered contract after those rates are incorporated into the contract.

Under the new rule, if a revised wage determination is issued after the contract award (or after the beginning of construction if there was no contract award), the new determination will apply to the project if:

- A. The contract is changed to include substantial additional, covered work that was not within the scope of work of the original contract. This could include any significant change orders.
- B. The contract is modified to require the contractor to perform work for an additional period of time not originally covered in the contract, including situations where an option to extend the term of the contract is exercised. This would not apply if a contractor is simply given additional time to complete the original scope of work.
- C. The contract covers construction, alteration, or repair work over a period of time that is not tied to the completion of any particular project. Contracts of this nature must update the applicable prevailing wage determinations on the anniversary date of the contract award unless the contracting agency has obtained prior written approval from the DOL.

It is important to note that the new rule does not provide for automatic contract price adjustments when the prevailing wage determination is increased – the Department of Labor’s position on this issue is “the Department believes that issues related to budgeting, pricing and cost associated with these types of contracts can be addressed between the contractor and the agency as part of the contracting process.”

5. Adopting state and local prevailing wage rate determinations. Under the new rule, the state/local prevailing wage rates may be adopted by the DOL if the Administrator of its Wage and Hour Division concludes that:

- A. The state/local government process is open to full participation by all interested parties.
- B. The state/local prevailing wage rates reflect both the basic hourly rate of pay and the prevailing fringe benefits, which must be calculated separately.
- C. The state/local government determinations use relevant worker classifications can be related to the DOL’s recognized workers classifications.
- D. The state/local government’s criteria for setting prevailing wage rates are “substantially similar” to those used by the DOL, based on a totality of circumstances.

The Administrator will have substantial discretion in making these determinations and given the current level of deference courts give to administrative agencies, it will be extremely difficult to challenge the DOL’s adoption of a state/local prevailing wage rate.

The impact of this change will be to subject employers to the vagaries of state/local government agencies, which tend to have more highly politicized (and one-sided) decision-making processes. This would allow parties who have a greater influence on state/local politics to essentially set the federal prevailing wage rate under Davis Bacon.

### Conclusion

The net effects of these clarifications and changes are essentially twofold:

1. They will generally increase prevailing area wage rates; and
2. They will increase the influence that collective bargaining agreements have on establishing prevailing area wage rates.

These changes make it increasingly important for employers covered by Davis Bacon to both stay up to date on the appropriate prevailing wage rates to be paid to their covered workers and to pay particular attention to the language in their covered contracts. This is especially true given the increased (and potentially dire) legal consequences of failing to comply with Davis Bacon's requirements, which will be explained in Part 3 of this article.